

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK J. FRAME,

NO. C08-933-JCC-JPD

Plaintiff,

V.

REPORT AND RECOMMENDATION

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Plaintiff Frank Frame appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which granted in part but also denied in part his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be **AFFIRMED** and this case be **DISMISSED** with prejudice.

I. FACTS AND PROCEDURAL HISTORY

At the time of Plaintiff's hearing at issue, he was a fifty-six year old man with a high school education and one year of vocational training. Administrative Record ("AR") at 21,31, 143. His past work experience includes employment as a janitor in a cabinet shop, a deburrer

specialist in a metal fabrication shop, and a drafter for the Boeing Company. AR at 146.

Plaintiff was last gainfully employed on June 1, 2003. AR at 24.

On November 17, 2003, plaintiff filed a claim for DIB. AR at 21. On February 18, 2004, he filed an application for SSI. Both applications were denied initially and on reconsideration. *Id.* Plaintiff requested a hearing which took place on October 6, 2005, and on March 29, 2006, he received an adverse decision from the ALJ. He appealed to the Appeals Council, but because the transcript of the hearing could not be located, the matter was returned to the ALJ for a *de novo* hearing. *Id.* A new hearing took place on June 18, 2007. AR at 355-96. On July 23, 2007, the ALJ issued a decision finding the plaintiff to be disabled as of the advent of his fifty-fifth birthday, as he had reached “advanced age” pursuant to Social Security Regulations (20 C.F.R. §§ 404.1564 and 416.964). However, the plaintiff was found not disabled prior to this time. Plaintiff’s administrative appeal of this partial denial was denied by the Appeals Council on April 11, 2008, AR at 7-9 making the ALJ’s ruling the “final decision” of the Commissioner as that term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the Commissioner’s decision. Dkt. No. 3.

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed
8 and further administrative proceedings would serve no useful purpose." *McCartey v.*
9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
12 claimant's evidence; (2) there are no outstanding issues that must be resolved
13 before a determination of disability can be made; and (3) it is clear from the
14 record that the ALJ would be required to find the claimant disabled if he
15 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
17 erroneously rejected evidence may be credited when all three elements are met).

18 IV. EVALUATING DISABILITY

19 As the claimant, Mr. Frame bears the burden of proving that he is disabled within the
20 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
21 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
22 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
23 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
24 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are
25 of such severity that he is unable to do his previous work, and cannot, considering his age,
26 education, and work experience, engage in any other substantial gainful activity existing in the
national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).¹ If he is, disability benefits are denied. If he is not, the
8 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
9 or more medically severe impairments, or combination of impairments, that limit his physical
10 or mental ability to do basic work activities. If the claimant does not have such impairments,
11 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
12 impairment, the Commissioner moves to step three to determine whether the impairment meets
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
20 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
21 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,
22 then the burden shifts to the Commissioner at step five to show that the claimant can perform
23 other work that exists in significant numbers in the national economy, taking into consideration

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25 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
26 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R.
§ 404.1572.

1 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),
2 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable
3 to perform other work, then the claimant is found disabled and benefits may be awarded.

4 V. DECISION BELOW

5 On July 23, 2007, the ALJ issued a decision finding the following:

- 6 1. The claimant meets the insured status requirements of the Social
7 Security Act through March 31, 2008.
- 8 2. The claimant has not engaged in substantial gainful activity since June
1, 2003, the alleged onset date.
- 9 3. The claimant has the following severe impairments: degenerative disc
10 disease of the lumbar spine, status post remote laminectomy; cognitive
11 disorder, status-post head injury and craniotomy; and dysthymic
disorder.
- 12 4. The claimant does not have an impairment or combination of
13 impairments that meets or medically equals one of the listed
14 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 15 5. After careful consideration of the entire record, I find that, since his
16 alleged onset date, the claimant has had the residual functional
17 capacity to lift and carry 20 pounds occasionally and 10 pounds
18 frequently, to sit for 6 hours in an 8-hour workday and to stand and/or
19 walk for 6 hours in an 8-hour workday, with no limitations with regard
20 to pushing and pulling the above amounts. He is able to perform
21 simple, repetitive tasks in a job that involves occasional contact with
22 the public.
- 23 6. The claimant's residual functional capacity allows him to perform the
24 exertional demands of "light" work under the regulations. If a
25 claimant can do light work, he or she is also deemed capable of doing
sedentary work (unless he or she has additional limitations not at issue
in this case).
- 26 7. The claimant is unable to perform any of his past relevant work.
8. The claimant was 51 years old on the alleged onset date of disability.
This is defined in the regulations as an individual "closely approaching

1 advanced age.” On XXXXX, 2006,² the claimant turned 55, and his
2 age category changed to an individual of “advance age.”
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- 5 9. The claimant has a high school education and is able to communicate
6 in English.
- 7 10. The claimant has no job skills that would transfer to other occupations.
- 8 11. Prior to XXXXX, 2006, the date the claimant’s age category changed,
9 considering the claimant’s age, education, work experience, and
10 residual functional capacity, there were a significant number of jobs in
11 the national economy that the claimant could have performed.
- 12 12. Beginning on XXXX, 2006, the date the claimant’s age category
13 changed, considering the claimant’s age, education, work experience,
14 and residual functional capacity, there are not a significant number of
15 jobs in the national economy that claimant could perform.
- 16 13. The claimant was not disabled prior to XXXXX, 2006, but became
17 disabled on that date and has continued to be disabled through the date
18 of this decision.

19 AR at 24-32.

20 VI. ISSUES ON APPEAL

21 The issue on appeal is whether substantial evidence supports the ALJ’s conclusion that
22 the plaintiff was not disabled prior to XXXX, 2006, when he began to receive benefits. The
23 specific assignments of error are:

- 24 1. Did the ALJ err in his evaluation of the opinion of Dr. Rudisill?
- 25 2. Did the ALJ err in making an adverse credibility determination?
- 26 3. Did the ALJ err in his assessment of the plaintiff’s RFC?
- 27 4. If there is error, should the case be remanded for an award of benefits?

28 Dkt. No. 12 at 6.

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VII. DISCUSSION

A. The ALJ Did Not Err in His Evaluation of the Opinion of Dr. Rudisill or His Assessment of Plaintiff's Credibility

Plaintiff's first assignment of error is that the ALJ failed to properly consider the opinion of Heather Rudisill, M.D. It appears that Dr. Rudisill treated plaintiff at the Valley Medical Center for back pain. Dr. Rudisill wrote that plaintiff had significant mental and memory problems and spine disease that severely limited his physical abilities. AR at 307. The ALJ rejected the opinion, raising questions as to whether Dr. Rudisill was in fact a treating physician, and concluding that her report was inconsistent with the remaining medical evidence of record and the plaintiff's daily activities.

1. Standards for Evaluating Medical Evidence

As a matter of law, more weight is given to a treating physician’s opinion than to that of a nontreating physician because a treating physician “is employed to cure and has a greater opportunity to know and observe the patient as an individual.” Magallanes, 881 F.2d at 751; see also *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician’s opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted. Magallanes, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Id.* (citing Magallanes, 881 F.2d at 751). The ALJ must do more than merely state his conclusions. “He must set forth his own interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

1 Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at
2 725.

3 The opinions of examining physicians are to be given more weight than non-examining
4 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
5 uncontradicted opinions of examining physicians may not be rejected without clear and
6 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
7 physician only by providing specific and legitimate reasons that are supported by the record.

8 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

9 Opinions from non-examining medical sources are to be given less weight than treating
10 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
11 opinions from such sources and may not simply ignore them. In other words, an ALJ must
12 evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96-6p
13 1996 WL 374180, at *2 (S.S.A.). Although an ALJ generally gives more weight to an
14 examining doctor's opinion than to a non-examining doctor's opinion, a non-examining
15 doctor's opinion may nonetheless constitute substantial evidence if it is consistent with other
16 independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002);
17 *accord Orn* at 495 F.3d 632-33.

18 2. *The ALJ Did Not Err In His Assessment of Dr. Rudisill Opinion or*
19 *Plaintiff's Credibility*

20 As noted above, the ALJ initially questioned whether Dr. Rudisill actually was a
21 treating physician. On December 14, 2005, counsel for plaintiff faxed a residual functioning
22 capacity report to the ALJ. AR at 303-07. There were no other indications in the medical files
23 that a person named Dr. Rudisill had seen plaintiff. The report was a check-the-box type of
24 form, but at the end, Dr. Rudisill also completed a narrative that stated:

25 Frank Frame has significant memory impairment that persists from brain
26 injury... [around] 1976 and has had formal evaluation in that regard on 3/19/04.
He has significant spine disease both facet and disc that severely limits his

1 physical abilities. We are attempting epidural steroid injection(s) in attempt to
2 decrease pain and increase functioning but I am uncertain as to how much
3 improvement we will get because of chronic nature of the disease. Currently he
is severely impaired by both mental/memory issues as well as pain and physical
disease of lumbar spine.

4 At the time of the initial hearing there were no other indications in the medical records
5 that the plaintiff had seen Dr. Rudisill. On July 19, 2007, after the initial opinion, after the
6 second hearing was ordered because tape of the first hearing was lost, and after the second
7 hearing took place, but four days before final ALJ opinion was issued, plaintiff's counsel
8 delivered 15 pages of medical reports (AR at 327-42), of which, 7 (AR at 328-34) relate to Dr.
9 Rudisill. It appears that Dr. Rudisill saw the plaintiff on October 6 or 7, 2005 (AR at 333-34),
10 October 28, 2005 (AR at 331) and December 9, 2005 (AR at 328). There are no further
11 records of meetings with Dr. Rudisill after the December 9, 2005 appointment, at which Dr.
12 Rudisill reported spending more than half the time counseling the plaintiff and filing out the
13 disability report discussed above. AR at 328.

14 These reports were sent to the Appeals Council, with other documents, after the ALJ's
15 adverse decision was issued, and are therefore part of the record. AR at 325-26. It appears
16 from all of the records that Dr. Rudisill was a treating physician for a limited period of time.
17 However, this is of no avail to plaintiff because the Court finds that the ALJ evaluated the
18 medical evidence consistent with the hierarchy set forth in *Orn*.

19 The ALJ concluded that the opinion of Dr. Rudisill was not supported by the bulk of
20 the medical evidence of record nor by plaintiff's daily activities. AR at 30. If accurate, this
21 would serve as a "specific and legitimate" reasons for rejecting her medical opinion. In
22 addition, the Commissioner argued that there was no objective basis for her opinions, but relied
23 solely on plaintiff's subjective complaints as there were no records or clinical findings to
24 support her opinion. Dkt. No. 13 at 4. The plaintiff contends that an MRI is just that. Both
25 parties are correct to some degree.

1 Dr. Rudisill offers two opinions. The first is that plaintiff is severely impaired as to
2 “mental/memory problems, as to which she provides no objective basis for her opinion.³ The
3 second is that plaintiff is severely impaired due to “pain and physical disease of the lumbar
4 spine,” as to which an MRI provides support.

5 As to the back impairment, although Plaintiff severely injured his back due to an auto
6 accident that happened in the mid-1970s, he was able to work with this condition at least until
7 his last employment in 2003. The ALJ concluded that “the medical evidence of record
8 confirms that he [t]he claimant was not having significant back problems at the time he
9 stopped working. He did not complain of back pain in any of the records in evidence from
10 2003. The first mention of back pain is in an examination from May 18, 2004, at which time
11 the claimant reported a history of back problems but denied any current back pain or radicular
12 symptoms.” AR at 27. This conclusion is supported in the record. AR at 270. From this
13 report, his treating doctor at Valley Medical Center concluded that plaintiff was probably
14 “mildly impaired” by his low back pain. *Id.* Later, in November 2004, plaintiff saw another
15 doctor at Valley Medical Center, Dr. Grayson. She was a treating physician for plaintiff and
16 reported that “He has had continued chronic low back pain, which he just has to be careful
17 about, but he is able to do his normal activities.” AR at 265. Sharon Shearer, M.D., a State
18 reviewing doctor concluded that the plaintiff was occasionally limited, but was able to perform
19 light work activity. AR at 274-75.

20 Dr. Rudisill’s opinions in this case are not supported by her colleagues at Valley
21 Medical Center, who were also treating physicians. In addition, they are not in line with the
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24 ³ Plaintiff suggests that this is supported by a reference to Dr. Dixon’s evaluation. Dkt.
25 No. 15 at 3. Yet, Dr. Dixon’s report would not support the conclusion that plaintiff suffered a
26 mental impairment to the extent urged by Dr. Rudisill. See Dixon report. AR at 257-63. The
ALJ gave substantial weight to the opinion of Dr. Dixon in concluding that the plaintiff was
not disabled. AR at 28-29. Plaintiff does not suggest that either Dr. Dixon’s opinions were
flawed or that the ALJ erred in his assessment of Dr. Dixon’s evaluation.

1 opinions of the other medical reports before the ALJ. The ALJ did not err in concluding that
2 Dr. Rudisill's report was not consistent with the rest of the medical evidence of records.

3 The ALJ's rejection of Dr. Rudisill's opinions is also supported by the adverse
4 credibility determination based, in part, on plaintiff's daily activities. Plaintiff reported that he
5 was able to mow the lawn, could lift 100 pounds and walk for 1 to 2 miles before needing to
6 rest, and went fishing with his friends as often as possible. AR at 27, 30, 207. Plaintiff objects
7 to reliance on some of his self-statements of his capabilities, stating that the ALJ erred by
8 ignoring plaintiff's hearing testimony that he was simply "exaggerating" when he provided
9 these statements. Dkt. No. 12 at 7, AR at 386. This is a classic credibility issue, which is
10 within the province of the ALJ, rather than this Court. *Andrews*, 53 F.3d at 1039. The adverse
11 credibility determination based on plaintiff's own reports of his daily activities is supported by
12 the record, and this also provides a secondary basis for the ALJ's decision to reject Dr.
13 Rudisill's opinion. The ALJ did not err in either regard.

14 B. The ALJ Did Not Err in His RFC Assessment

15 The ALJ determined that until plaintiff became an individual of advanced age, as
16 defined by the regulations, he had the RFC to perform the exertional demands of "light" or
17 "sedentary" work. Plaintiff's RFC is the most he can do considering his impairments and
18 limitations. SSR 96-8p, *available at* 1996 WL 374184. "[M]any medical conditions produce
19 pain not severe enough to preclude gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603
20 (9th Cir. 1989).

21 The ALJ's RFC finding and hypothetical to the vocational expert "took into account
22 those limitations for which there was record support that did not depend on [the claimant's]
23 subjective complaints" that lacked credibility. Tr. 26, 392-93. *Bayliss*, 427 F.3d at 1217.
24 Plaintiff objects that the ALJ's hypothetical failed to include limitations expressed by Drs.
25 Clifford and Peterson. Dkt. 12 at 14-15. Drs. Clifford and Peterson are Washington State
26 reviewing psychologists who completed a Mental Residual Functional Capacity Assessment

Report. AR 293-96. Among other things, the doctors checked a box indicating “moderate” limitations in “ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.” At the hearing, the VE was asked by plaintiff’s counsel if a number of limitations, including a “moderate limitation on the ability to complete a normal workday and work week.” AR at 395. The VE testified that this would rule out most jobs, because “he would miss time from work more than would be acceptable by most employers.”

Id.

However, the check for moderate limitations by Drs. Clifford and Peterson must have referred to limitations on his ability to perform at a constant pace. In their written assessment, they specifically noted that there “is no evidence that he cannot sustain satisfactory attendance and punctuality.” AR at 296. With respect to problems of concentration, persistence and pace, the ALJ included these limitations in his RFC by limiting him to simple, repetitive tasks with only occasional public contact. AR at 26.

Plaintiff further objects that his mental impairments would prevent him from performing as a flagger, one of the representative jobs named by the VE. This is unavailing to plaintiff, as this was identified solely as a representative job. Moreover, the plaintiff raises no similar objection specific to the other representative job identified by the VE, that of garment sorter. Accordingly, the inclusion of a flagger as a possible job must be considered harmless error at best. *Stout v. Comm'r of Soc. Sec.*, 454 F.3d 1050, 1054-55 (9th Cir. 2006) (harmless error analysis is appropriate where the mistake is nonprejudicial to claimant or irrelevant to nondisability conclusion).

VIII. CONCLUSION

The role of this Court is limited. When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Thomast*, 278 F.3d at 954. It is possible to interpret the medical evidence as suggested by the plaintiff.

1 However, this is not the only rational interpretation of the evidence. For the foregoing reasons,
2 the Court recommends that the Commissioner's decision be AFFIRMED and that this case be
3 DISMISSED with prejudice. A proposed order accompanies this Report and
4 Recommendation.

5 DATED this 13th day of April, 2009.

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8 JAMES P. DONOHUE
9 United States Magistrate Judge
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